

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
vs.
DOUGLAS JAMES SCANLON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE DISABILITY AND EMPLOYMENT
ADVOCACY PROJECT OF THE EMPLOYMENT LAW CENTER
IN SUPPORT OF RESPONDENT DOUGLAS JAMES SCANLON**

JOAN M. GRAFF
Executive Director

ROBERT BARNES
Counsel of Record

WILLIAM HEBERT
Law Clerk

DIANE G. WORLEY
Law Clerk

*Employment Law Center
693 Mission Street, #701
San Francisco, California
(415) 495-6420*

51262

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THIS COURT'S DECISIONS ON THE ELEVENTH AMENDMENT HAVE DEVELOPED TO RECONCILE THE COMPETING INTERESTS OF THE STATE AND FEDERAL GOVERNMENTS	7
II. CALIFORNIA'S SOVEREIGN IMMUNITY IS LIMITED BY THE FOURTEENTH AMENDMENT	21
III. THE ELEVENTH AMENDMENT DOES NOT BAR RESPONDENT'S PRAYER FOR INJUNCTIVE RELIEF, ATTORNEY'S FEES OR EQUITABLE RELIEF	32
CONCLUSION	42

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<u>Alexander v. Choate</u>	
<u>U.S.</u>	
53 L.W. 4072'	30, 41
<u>Chisolm v. Georgia (1793)</u>	
2 U.S. 419	7, 8, 9, 43
<u>Clark v. Barnard (1883)</u>	
108 U.S. 436	9
<u>Consolidated Rail Corp. v.</u>	
<u>Darrone (sub. nom: Le</u>	
<u>Strange v. Consolidated</u>	
<u>Rail Corp. (1984)</u>	
<u>U.S.</u>	
104 S. ct. 1248	30, 41
<u>Edelman v. Jordan (1974)</u>	
415 U.S. 651	passim
<u>EEOC v. Wyoming (1983)</u>	
460 U.S. 226	29
<u>Employees v. Missouri</u>	
<u>Public Health Dept. (1973)</u>	
411 U.S. 279	20, 25, 38, 39
<u>Ex parte Virginia (1880)</u>	
100 U.S. 339	9, 10, 11, 18, 22, 42
<u>Ex parte Young (1908)</u>	
209 U.S. 123	passim

	<u>Page(s)</u>
<u>Fairmont Creamery Co. v. Minnesota (1927)</u>	
275 U.S. 70	36, 37
<u>Fitzpatrick v. Bitzer (1976)</u>	
427 U.S. 445	passim
<u>Florida Department of State v. Treasure Salvors (1982)</u>	
458 U.S. 670	12
<u>Ford Motor Co. v. Dept. of Treasury (1945)</u>	
323 U.S. 459	15, 20, 38
<u>Guardian's Ass'n. v. Civ. Serv. Com'n of City of N.Y. (1983)</u>	
U.S. 104 S. Ct. 3221	30
<u>Hans v. Louisiana (1890)</u>	
134 U.S. 1	8, 9, 20, 42
<u>Hutto v. Finney (1978)</u>	
437 U.S. 678	passim
<u>In re Ayers (1887)</u>	
123 U.S. 443	20
<u>Milliken v. Bradley (1977)</u>	
433 U.S. 267	19, 35, 39, 40
<u>Mitchum v. Foster (1972)</u>	
407 U.S. 225	18
<u>Parden v. Terminal R. Co. (1964)</u>	
377 U.S. 184	19, 20, 38

	<u>Page(s)</u>
<u>Pennhurst State School</u>	
<u>Hospital v. Halderman</u> (1984)	
U.S.	
104 S. Ct. 900	23, 26, 34
<u>Perez v. Ledesman</u> (1971)	
401 U.S. 82	34
<u>Quern v. Jordon</u> (1979)	
440 U.S. 332	26, 35
<u>Scheuer v. Rhodes</u> (1974)	
416 U.S. 232	35
<u>South Carolina v. Katzenbach</u>	
(1966)	
383 U.S. 301	18
<u>Southeastern Community College v.</u>	
<u>Davis</u> (1979)	
442 U.S. 397	27

Federal Statutes

Rehabilitation Act of 1973,	
Pub. L. 93-112,	
87 Stat. 357 (29 U.S.C.	
section 701 et seq.) ..	passim
29 U.S.C. section 794	33, 36
42 U.S.C.	
section 1983	26
section 2000d	26, 27

Texts

Page(s)

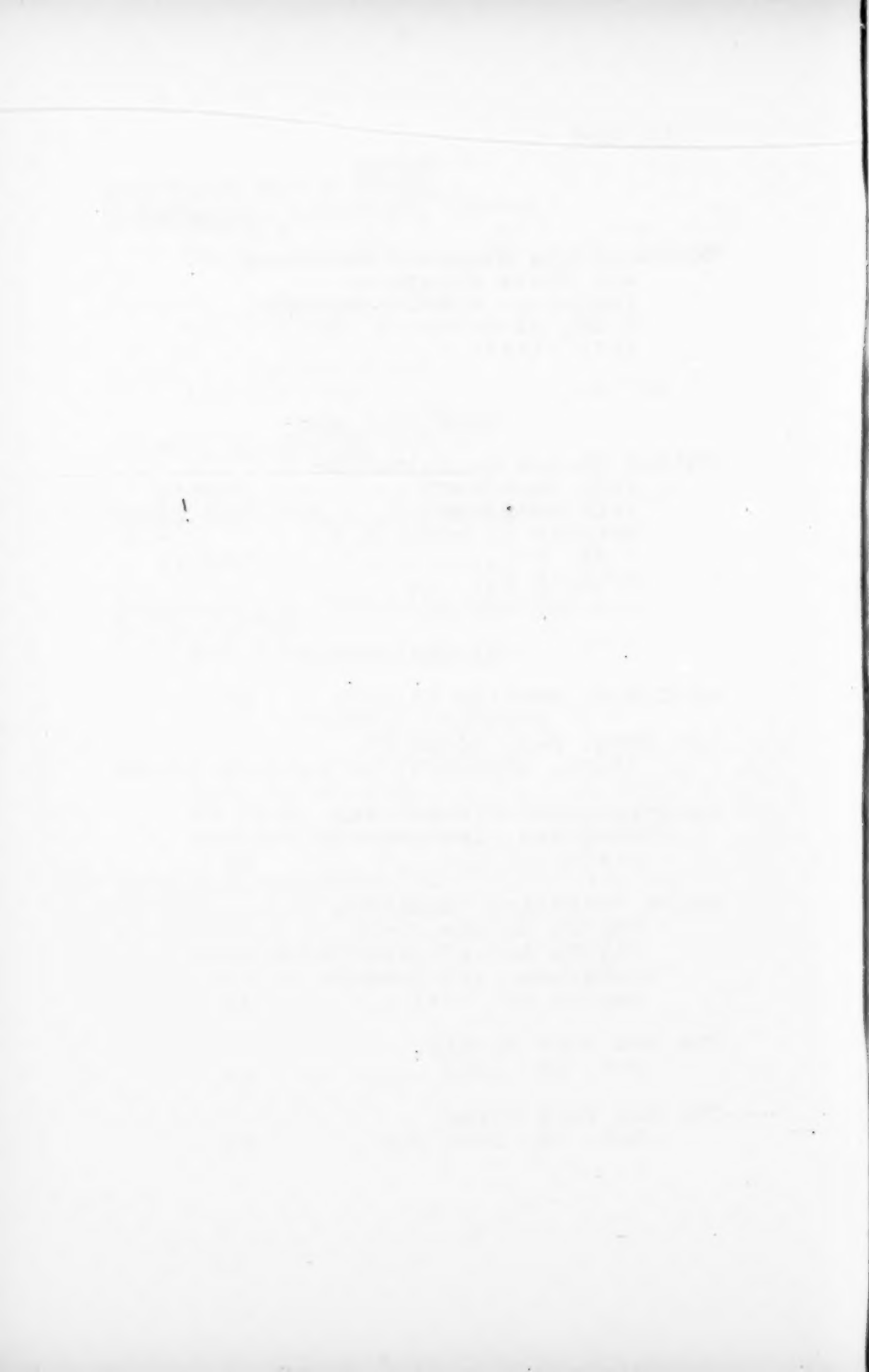
Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpreta- tion, 83 Colum. L. Rev. 1889 (1983)	7, 19
---	-------

Constitutions

United States Constitution	
11th Amendment	passim
14th Amendment	passim
Article I, section 8, cl. 1	28, 31
Article III	7

Miscellaneous

45 C.F.R. section 84.2(f) ..	27
124 Cong. Rec. 30346-47 (Sept. 20, 1978)	29
Congressional Globe, 39th Congress, 1st Session (1866)	24
House Judiciary Committee Report on the Civil Rights Act of 1964 (88th Congress, 1st Session, Report No. 914)	30
The New York Herald, Oct. 25, 1866	24
The New York Times, Oct. 25, 1866	24



In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
vs.
DOUGLAS JAMES SCANLON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE DISABILITY AND EMPLOYMENT
ADVOCACY PROJECT OF THE EMPLOYMENT LAW CENTER
IN SUPPORT OF RESPONDENT DOUGLAS JAMES SCANLON**

INTEREST OF AMICUS CURIAE

The Amicus Curiae, the Disability
and Employment Advocacy Project of the

Employment Law Center¹, is funded by a joint grant from the San Francisco and Wallace Alexander Gerbode Foundations to address issues regarding the employment rights of disabled individuals through education and legal advocacy. This project monitors California and federal court and administrative decisions of significance to disabled Californians; it publishes a quarterly newsletter designed to increase community awareness of the employment rights of disabled individuals; it trains California attorneys in the law of employment discrimination on the basis of handicap; and, it files amicus briefs in cases raising issues regarding the interpretation and enforcement of laws

¹Letters from counsel for the parties to this action, which consent to the filing of the Brief for the Amicus Curiae, have been filed with the Clerk of the Court pursuant to the U.S. Supreme Court Rule 42(2).

pertaining to employment discrimination based on physical handicap.

The issue presented in the case at bar, whether the Eleventh Amendment to the Constitution of the United States immunizes Atascadero State Hospital from suit by Douglas James Scanlon under Section 504 of the Rehabilitation Act of 1973, has great significance for the people served by the project.² Because the project serves both the disabled and the attorneys that represent them, the availability of remedies under Section 504 of the Rehabilitation Act of 1973 are of great moment to this amicus curiae. In California the state itself employs more people than any other employer.³ It is

²It is estimated that more than one and one-half million disabled Californians were employed or sought employment in 1978. "Executive Summary For The California Disability Survey", (prepared for the California Department of Rehabilitation), J. Merrill Shanks and Howard E. Freeman.

³California currently employs in excess of 180,000 employees.

also one of the major beneficiaries of federal funds under the Rehabilitation Act of 1973.⁴ Accordingly, it is not surprising that the vast majority of the federal cases that involve the amicus curiae are cases involving claims of employment discrimination against California, California agencies or California agents.

⁴Public records indicate that for fiscal year 1983, California received a total of \$26,684,822,392 from the U.S. Department of Health and Human Services alone. Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Geographic Area, Fiscal Year 1983, Region IX," DHHS Publications No. (65) 83-12.

SUMMARY OF THE ARGUMENT

This suit presents the question of whether the Eleventh Amendment bars employment discrimination actions against the states brought under the Rehabilitation Act of 1973. The Court of Appeals for the Ninth Circuit held that a private suit against the state is not barred. We agree. We take the position that the principles of federalism that underlie the Constitution suggest that this Court should weigh the competing interests of the state and federal governments in making its decision. We submit that the Court consider the following issues as they relate to abrogation of sovereign immunity: first, whether the Congressional Act in question was passed pursuant to the Fourteenth Amendment; second, whether the federal government has a legitimate

interest in asserting control over behavior traditionally regulated by Congress; third, whether the relief requested is prospective or retroactive. We feel that given these three considerations, the scale tips in the direction of the federal government in the case at bar. The federal judiciary is thus the proper forum to litigate suits against the state brought under the Rehabilitation Act of 1973.

ARGUMENT

I. THIS COURT'S DECISIONS ON THE ELEVENTH AMENDMENT HAVE DEVELOPED TO RECONCILE THE COMPETING INTERESTS OF THE STATE AND FEDERAL GOVERNMENTS

The Constitution as originally framed gave the federal judiciary under Article III the power to hear "Controversies . . . between a State and Citizens of another State." In Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the Court interpreted Article III to mean that its jurisdiction extended to suits where the state is a defendant. The suit, brought by two residents of South Carolina, was an action to recover the price of military goods sold to Georgia in 1777. The Court ruled that it had original jurisdiction, and that Georgia was compelled to enter an appearance. As one commentator interprets the decision,¹ the effect of the

¹See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation. 83 Colum. L. Rev. 1889 (1983).

decision, had it not been overruled by the Eleventh Amendment, would have been to force southern states to pay for the security of the new nation because these states were the probable defendants in suits by British citizens whose property had been confiscated after the war.

A few days after the decision in Chisolm Congress introduced what was to become the Eleventh Amendment.⁶

Although the wording of the Amendment does not preclude federal court jurisdiction over suits brought against a state by its own citizens, the Amendment was interpreted to prohibit such suits in Hans v. Louisiana, 134 U.S. 1 (1890). The Court's decision in Hans reflected a situation that somewhat resembled that faced in

⁶The amendment as originally introduced, read: "The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Chisolm. Hans arose out of Louisiana's repudiation of its bond obligations. Southern states, after the Civil War, overzealously issued bonds to finance internal improvements. Later pressure to repudiate the bonds led to numerous suits by citizens against their home states. The Supreme Court, after the passage of the Eleventh Amendment, refused to exercise its jurisdiction over suits which involved claims against the states' fiscs.

While this Court in Hans has recognized that a state is generally immune from suit, it has also recognized that the immunity of a state is not absolute and has circumscribed its application.⁷ These limitations were declared in Ex parte Virginia, 100 U.S. 339 (1880) and

⁷No one disputes, of course, that a state may be sued when it expressly consents to suit. See Hans v. Louisiana, *supra*, at 17; Clark v. Barnard, 108 U.S. 436 (1883).

Ex parte Young, 209 U.S. 123 (1908). In Ex parte Virginia, 100 U.S. 339 (1879), the Court stated that the Civil War amendments transferred power from the states to the federal government.

[I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Ex parte Virginia, supra, at 346.

Areas that were once solely regulated by the states became subject to federal scrutiny and subsequent enforcement by federal courts by reason of § 5 of the Fourteenth Amendment. The states submitted to federal control when they ratified that Amendment. This Court has reaffirmed the soundness of its holding in

Ex parte Virginia within the past ten years. See Fitzpatrick v. Bitzer, 427 U.S. 445, 454-455 (1976).

In Ex parte Young, citizens of Minnesota sued the state attorney general to enjoin him from enforcing a law that deprived them of due process. The doctrine of Ex parte Young holds that a suit against an official in his official capacity is not a suit against the state; that when the official acts unconstitutionally, he is "stripped of his official or representative character," Young, supra, 209 U.S. at 160, and cannot claim the shield that the Eleventh Amendment would otherwise provide. The Court has repeatedly affirmed Ex parte Young in spite of the obvious fact that suits against state officials often result in judgments that must be implemented by the particular state. The Court has simply considered the Fourteenth Amendment rights

paramount to the state's interest in immunity. See, e.g., Florida Department of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

Notwithstanding this Court's decisions in Ex parte Young and Fitzpatrick v. Bitzer, Petitioners argue in their brief that recent decisions of this Court hold that sovereign immunity is only qualified when Congress expresses its intent in "clear language" to set aside sovereign immunity. (Brief for Petitioners, p. 33.) Petitioners argue that this expression of intent is the first part of a two part test, the second part being whether the state has consented to suit, or has waived its immunity from suit.⁸ Petitioners claim that this is the strict rule of the Court, and that this rule must be followed in the case at bar. But Petitioners

⁸See, for example, Brief for Petitioners, p. 36.

cannot consistently support their position.

Petitioners argue that the rule is that there must be an abrogation of immunity by Congress and a consent to this abrogation by the states. (Brief for Petitioners, p. 31.) Petitioners claim that the "determining factor" in this rule is the clarity of congressional intent in the statutory scheme to bring the states under federal jurisdiction. (Brief for Petitioners, p. 34; Edelman v. Jordan, 415 U.S. 651 (1974).) As Petitioners immediately recognize, however, there is an "aberration" to this rule: Hutto v. Finney, 437 U.S. 678 (1978). (Brief for Petitioners, p. 33, n. 9.) Petitioners' explanation for this "aberration" is merely an admission that regardless of the clarity of congressional intent to abrogate, fee awards to the prevailing party are permissible against the state.

(Brief for Petitioners, pp. 76-77.) By this admission, Petitioners must abandon any pretense of their earlier claim that the statutory scheme must include clear language that the state's immunity has been abrogated, or that the state must somehow consent to the suit.

Petitioners also concede that legislation passed pursuant to the Fourteenth Amendment effectively removes the need to look to the second part of this strict test. (Brief for Petitioners, pp. 41-42; see also p. 42, n. 13.) This anomaly in Petitioners' argument arises because of this Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where it is stated, "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States

or state officials which are constitutionally impermissible in other contexts."

Fitzpatrick, supra, 427 U.S. at 456.

(Footnote omitted.)

The "other contexts" to which the Court refers are those in which the Civil War Amendments are not involved and particularly where a judgment, unsupported by statutory language, would provide for a liability against the state payable directly out of the state treasury.

(E.g., Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945).) This distinction serves to highlight another contradiction in Petitioners' position. Petitioners, on the one hand, claim that this Court applies a strict rule in sovereign immunity cases requiring "clear language" in the statutory scheme evidencing Congressional intent to abrogate state immunity, but by conceding that this rule does not apply in suits where the relief

requested is merely prospective, Petitioners bifurcate their rule: the showing of clear language applies only to suits for retroactive relief, but not to suits for prospective relief. (See, e.g., Brief for Petitioners, pp. 45-48.) The irreconcilability of the cases themselves with the strict rule enunciated by Petitioners in the opening of their brief manifests the problem with their position.

We submit that the contradictions found in Petitioners' brief are irreconcilable only because Petitioners stubbornly cling to a strict rule that fails adequately to explain the Eleventh Amendment decisions of this court. We believe that the decisions of this Court are consistent. We contend that the cases decided under the Eleventh Amendment are not based upon the two-part rule of clear statutory language expressing congressional-

al intent to abrogate immunity and concomitant waiver or consent by the state, but upon a more flexible principle: a balancing of competing state and federal interests which underlie our constitutional form of government. We agree with the Court that decisions concerning sovereign immunity must be decided using "[t]he principles of federalism that inform Eleventh Amendment doctrine. . . ." Hutto v. Finney, supra, 437 U.S. at 691.

If we look at the Court's Eleventh Amendment decisions through federalist glasses, we shall see through the "clear language" rule and the illusory contradictions it engenders. We have ascertained the following general considerations that the Court uses to balance federal and state interests. The first consideration is the section of the Constitution under which the statute in question was passed. Laws passed pursuant to the Fourteenth

Amendment inherently express a greater showing of abrogation of state immunity from suit. (Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).) The states relinquished power to the federal government when they ratified it. (Ex parte Virginia, 100 U.S. 339 (1879).)

Ex parte Virginia's early recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Mitchum v. Foster, 407 U.S. 225, 238-239 (1972). There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the states.

Fitzpatrick v. Bitzer,
supra, at 455.

The second consideration is whether the federal government has a legitimate interest in asserting control over behavior traditionally regulated by Congress. The federal government tries to ensure that every citizen will receive

equal treatment under the laws and that there exists a uniformity in the application of federal law from state to state. Parden v. Terminal Railway Co., 377 U.S. 184 (1964); Milliken v. Bradley, 433 U.S. 267 (1977).

In light of this weighing principle, we find that Petitioners' argument for a "clear language" rule has only one limited application, which is the Court's third consideration: whether a judgment can be entered for retroactive relief. The reasoning behind the clear language rule is that the area of most interest to the state is its fisc. As the history of the Eleventh Amendment testifies, most cases barred are for monetary relief.⁹ As the

⁹See, for example, Gibbons, supra. Gibbons argues that the Court in Hans declared the existence of immunity from citizen suits because the southern states refused to honor bonds issued after the Civil War, and that the federal judiciary (due to an act of Congress that limited the use of army regulars by federal marshals) had no means to enforce its decrees against the states. See also, In

Court noted in Parden, the purpose of the Eleventh Amendment is to keep the long arm of the federal judiciary out of the treasuries of the states:

This case is distinctly unlike Hans v. Louisiana, supra, where the action was a contractual one based upon state bond coupons, and the plaintiff sought to invoke federal question jurisdiction by alleging an impairment of the obligation of the contract. Such a suit on state debt obligations without the State's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the Hans case were directed.

Parden v. Terminal R. Co.,
supra, 377 U.S. at 187-188.

The clear language rule evolved as a means to protect states from unwarranted intrusions into their treasuries by the federal judiciary. But as we shall demonstrate, laws passed pursuant to the

re Ayers, 123 U.S. 443 (1887), holding that Virginia could repudiate her coupons without federal interference; Edelman v. Jordan, 415 U.S. 651 (1974); Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945). But cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Fourteenth Amendment allow greater discretion by federal courts to grant equitable relief to aggrieved parties.

By weighing the considerations outlined above, this Court will find a logical way to reconcile its earlier decisions, all of which are based upon the inherent tensions of our federalist system of government. We contend that the Court must find that the federal interest in maintaining jurisdiction over citizen suits brought under the Rehabilitation Act of 1973 as amended will outweigh the state's interest in asserting its immunity.

II. CALIFORNIA'S SOVEREIGN
IMMUNITY IS LIMITED BY
THE FOURTEENTH AMENDMENT.

Under Section 5 of the Fourteenth Amendment, Congress has the power to

remedy state discrimination found to deny equal protection. This power to determine whether the Fourteenth Amendment has been violated and to determine what the appropriate remedies are is extensive. The Court has made it clear that the need to legislate under Section 5 will warrant federal intrusion upon the states in certain circumstances. See, e.g., Fitpatrick v. Bitzer, supra, at 454.

In Ex parte Virginia, supra, the Supreme Court stated:

The prohibitions of the fourteenth amendment are directed to the states, and they are to a degree restrictions of state power. It is those which congress is empowered to enforce, and to enforce against state action.
. . . [S]uch enforcement is not an invasion of sovereign immunity.
. . . [T]he constitutional amendment is ordained for a purpose.

Id at 346-47.

In 1976, the Supreme Court reaffirmed Ex parte Virginia stating that "the Fourteenth Amendment was intended to be . . . a limitation of the power of the

state and an enlargement of the power of Congress." Fitzpatrick, at p. 454.

Even more recently in Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984) (hereinafter Pennhurst II), the Court emphasized the subordination of the sovereign immunity doctrine to federal interests. Pennhurst II discusses Ex parte Young, 209 U.S. 123 (1908) as a case marking the emergence of the idea that conduct which threaten to violate federal constitutional rights -- in Young itself, the right to substantive due process -- was inherently actionable as a matter of federal law.

Clearly, the Amendment was intended to alter the federalist balance of power between the states and the General Government and to centralize power over matters arising under the Fourteenth Amendment in the federal government. By ratifying the Amendment, the states surrendered power to

the federal government. Public debate focused on the fact that the branches of the federal government would be given increased power over individual rights to the detriment of state autonomy. See, e.g., The New York Herald, Oct. 25, 1866 at 6, col.4; New York Times, Oct. 25, 1866 at 4, col.3.

Also, it appears that Congress was to be given extremely broad powers to enforce the amendment. Part of the evidence of this power comes from the failure of most members of Congress to discuss Section 5 during the debates while going over in detail the other sections. See, e.g., Congressional Globe, 39th Congress, 1st Session (1866) at 2469 (Rep. Kelly) 2502, 2512 (Rep. Raymond). The failure to discuss the section seems to stem from a widely held belief that it was an open ended grant of power to enforce the other sections.

Petitioners cites Employees v. Missouri Public Health and Welfare for the proposition that the statute must expressly abrogate the states immunity from retroactive liability.¹⁰ However, in Hutto v. Finney, 437 U.S. 678, 698, n. 31, the court clearly distinguished the claims in both Employees and Edelman as being based on statutes rooted in Congress' Article I powers. In Hutto as in Fitzpatrick, the claim is based on a statute enacted to enforce the Fourteenth Amendment. As pointed out in Fitzpatrick:

The Eleventh Amendment and the principle of sovereign immunity which it embodies . . . are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms

¹⁰See this brief, Section III, infra.

embody limitations on state authority.

Id. at 456.

Petitioner relies on Quern v. Jordan, 440 U.S. 332 (1979) as quoted in Pennhurst II at p. 907 to support the proposition that regardless of the source of Congress' power, its legislation must show evidence of express abrogation. In Quern this Court held that states are immune from suit brought under 42 U.S.C. Section 1983. Unlike Section 1983, Congress made no attempt to shield states from liability when drafting the Rehabilitation Act of 1973.

The regulations under which the Rehabilitation Act was implemented provide clear evidence that Congress intended states to be the prime recipients of federal financial assistance and subject them to a private right of action under Title VI of the Civil Rights Act of 1964,

42 U.S.C. sections 2000d et seq. First states are included within the definition of recipients under 45 C.F.R. section 84.2(f). Second, section 505 of the Act, 29 U.S.C. section 794, makes available to any person the remedies, procedures, and rights set forth in Title VI, in any action brought to enforce the Act.

Finally, the implementing regulations note that it is likely that recipients of federal financial assistance will be sued, if at all, through a private action. 45 C.F.R. section 84, App. 1 section 8.¹¹

Aware that California's sovereign immunity from suit under the Rehabilitation Act depends largely upon whether or not that Act is deemed to be an action of

¹¹In addition, California's amicus curiae brief in Southeastern Community College v. Davis, 442 U.S. 397 (1979), states: "It is clear that a private right of action under Section 504 has always been contemplated by Congress." Brief of California as Amicus Curiae in Southeastern Community College v. Davis at 18.

Congress pursuant to the Fourteenth Amendment, Petitioners argue it is not. It is clear, however, that the Rehabilitation Act is an exercise by Congress under Section 5 of the Fourteenth Amendment, as well as the Spending Clause.

Though an act may be passed pursuant to the spending power of Congress, this fact does not preclude it from also being passed pursuant to the Fourteenth Amendment. Petitioner argues that no language supports the contention that the Rehabilitation Act was passed pursuant to the enforcement clause of the Fourteenth Amendment. While it is true that the court must determine what is the intent of Congress, Congress need not recite the words "Section 5" or "Fourteenth Amendment" or "equal protection," in order for the court to determine that the statute was passed pursuant to the Fourteenth

Amendment. EEOC v. Wyoming, 103 S. Ct.
1054 (1983).

When Congress amended the Rehabilitation Act in 1978 to add attorneys' fees to the remedies available to prevailing parties, it squarely focused on the Eleventh Amendment immunity of the states. Senator Alan Cranston was one of the chief sponsors of the amendments. He stated:

. . . [With respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity; from funds of his or her agency or under his or her control; or from the State or local government -- regardless of whether such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in Hutto v. Finney, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or charge a violation under Title V of the Rehabilitation Act of 1973.

124 Cong. Rec. 30346-47
(remarks of Sen. Cranston,
Sept. 20, 1978).

Petitioners also contend that the language of Section 504 of the Rehabilitation Act is virtually identical to Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d, which has been characterized as typical spending legislation. Consolidated Rail Corp. v. Darrone, 104 S. Ct. at p. 1250 (1984); Guardian's Ass'n v. Civ. Serv. Com'n. of City of New York, 104 S. Ct. 3221 (1983).¹ In light of the legislative history behind the Civil Rights Act of 1964, this comparison is misleading if not incorrect.

The House Judiciary Committee Report on the Civil Rights Act of 1964 (88th Congress, 1st Session, Report No. 914)

¹See also Alexander v. Choate, ___ U.S. ___, 53 L.W. 4072, where a unanimous Court stated, "[T]oo facile an assimilation of Title VII law to section 504 must be resisted." Id. at 4073, n. 7.

established that the Act is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination.

In the last decade it has been increasingly clear, that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced on the one hand by a growing impatience by the victims of discrimination with its continuance and on the other hand, by a growing recognition on the part of all our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means to secure those rights.

That the Fourteenth Amendment is one of these provisions is supported in the remarks on the floor by the Hon. Robert Kastenmeir: "using both the Fourteenth Amendment and the commerce clause as the authority for requiring that the federal government shall take action to prevent the use of federal funds in support of segregated facilities." [Congress must be

given great latitude to effectuate the broad remedial purpose behind the Act.] Read in its entirety, the Civil Rights Act of 1964 was clearly implemented under Section 5 of the Fourteenth Amendment with Title VI being the means Congress chose to enforce its provisions.

Similarly, the Rehabilitation Act's overall purpose is clearly to provide handicapped persons the equal protection of the laws, with Section 504 being a means by which Congress chose to implement its provisions.

III. THE ELEVENTH AMENDMENT
DOES NOT BAR RESPONDENT'S
PRAYER FOR INJUNCTIVE
RELIEF, ATTORNEY'S FEES
OR EQUITABLE RELIEF

In his complaint, Scanlon prays for the following relief: that the court

1. Issue a preliminary and permanent injunction requiring defendants to employ plaintiff in a comparable position to the one for which he was rejected which will satisfy his field experience requirement for his recreation administration degree;

2. Declare that defendant's actions in refusing to hire plaintiff as a graduate student assistant violated 29 USC § 794 . . . ;
3. Award plaintiff monetary damages for lost salary with interest, all fringe benefits and all civil service rights from the time that he would have been employed. . . ;
4. Award plaintiff any further compensatory damages;
5. Award plaintiff his costs in bringing this action;
6. Award plaintiff reasonable attorney's fees;
7. Award plaintiff such other relief as the Court deems proper.

(Joint Appendix, pp. 21-22.)

The relief that Scanlon requests can be divided into three areas: injunctive relief, attorney's fees (including costs), and equitable relief. We shall examine each of these requests in turn.

The Eleventh Amendment is no bar to suits for prospective (injunctive) relief as suits brought to enjoin intentional discrimination under the Constitution

carry an overpowering need "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst II, supra, at 910 (quoting Ex parte Young, 209 U.S. 123, 160 (1908)). Regardless of whether there exists a statutory scheme explicitly naming states as possible defendants, the Eleventh Amendment does not bar suits to enjoin state officials from unconstitutional conduct. Ex parte Young, supra. Nowhere does the balancing principle between state and federal interests more clearly manifest itself than in suits following the doctrine of Ex parte Young. As Justice Brennan has observed,

Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.

Perez v. Ledesma. 401 U.S.
82, 106 (1971).

And as the Court pointed out in Quern v. Jordan, 440 U.S. 332, at 337 (1979), "[A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Edelman v. Jordan 415 U.S. 651, 667-668; see Milliken v. Bradley, 433 U.S. 267, 289 (1977); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974)." To enjoin Atascadero State Hospital and the California Department of Mental Health from discriminating against Scanlon clearly falls within the ambit of prospective relief..

Nor is the second type of relief - attorney's fees and costs - barred by the Eleventh Amendment. As Senator Cranston pointed out in his comments on § 794 of the Rehabilitation Act,¹³ this Court's

¹³See this brief, section II, supra.

decision in Hutto v. Finney, 437 U.S. 678 (1978) stands for the proposition that Congress may, in determining what is appropriate legislation, award attorney's fees to the prevailing party. Hutto v. Finney, supra, 693-694. Indeed, the opinion in Hutto relied upon the Court's decision in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), where the State challenged an award of such costs, but the Court "squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability." Hutto v. Finney, supra, at 696. (Emphasis added.) Section 794 of the Rehabilitation Act, on the other hand, explicitly provides for attorney's fees in actions brought to enforce the Act. When the federal judiciary awards costs against the state, it treats

the state "just as any other litigant" (Fairmont Creamery Co. v. Minnesota, supra, at 77); the federal court's award of fees serves to promote the federal interest in vindicating the supremacy of the laws of the United States by encouraging aggrieved parties to bring suits to enforce federal law.

Finally, we submit that equitable relief, Scanlon's third request, is not barred by the Eleventh Amendment in this instance. As the Court wrote in Edelman v. Jordan, supra, 415 U.S. at 667, "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between night and day." Because it is not an award for a legal obligation incurred before the litigation,¹⁴ compensation for the money

¹⁴Awards for legal obligations incurred

Scanlon would have been earning as an employee for the state while he conducts this lawsuit is ancillary, in accordance with the decisions of this Court. Such compensation would resemble the award of costs allowed in Hutto v. Finney, supra. The relief that Scanlon requests is compensation for lost wages incurred by him while California resists his suit. The relief prayed for is easily distinguished from that prayed for in

Employees.¹⁵ There the Court stated,

It is one thing, as in Parden, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are

prior to initiation of suit were the type of "evil" that the Eleventh Amendment was designed to prohibit. Parden, supra, at 187-188; see this brief, Section I, supra.

¹⁵ Similarly, the award requested in Edelman is distinguishable from that requested by Scanlon. In Edelman (as in Ford Motor Co.), the complainant requested that the state pay money that was withheld prior to the commencement of the litigation. Scanlon asks to recover money he loses by pursuing this litigation. It is money lost concurrent with the litigation and thus prospective.

reluctant to believe that Congress, in pursuit of a harmonious federalism, desired to treat the states so harshly.

Employees, supra, at 286.¹⁶

Nor is the amount of lost pay that he has accrued an issue, for it could have no more than an ancillary effect on California's treasury.¹⁷

Furthermore, the considerations for relief in cases of discrimination differ from those in other contexts. Milliken v. Bradley, supra, 433 U.S. 267 (1977), established the following three principles to guide district courts in their directions to state officials to alleviate discrimination:

¹⁶Scanlon does not ask to recover double, but merely to be made whole as if the discrimination had never taken place.

¹⁷Cf. Milliken v. Bradley, 433 U.S. at 293 (Powell, J. concurring), where the Court allowed an injunction ordering a State to pay almost \$6 million to desegregate the Detroit school system. That ancillary costs to end discrimination impose some liability on State governments is surely no bar to the district court granting backpay to Respondent Scanlon.

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. [Citation.] The remedy must therefore be related to 'the condition alleged to offend the Constitution. . . . ' Milliken [v. Bradley], 418 U.S. [717,] 738 (1974). Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Id., at 746. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. (Footnotes omitted.)

Milliken v. Bradley, *supra*, 280-281, as quoted in Hutto v. Finney, *supra*, 437 U.S. 678, 711 (Rehnquist, J., dissenting).

We believe that, consistent with this Court's guidelines that were established to remedy the wrongs caused by employment discrimination, Scanlon should be awarded relief designed to restore him to the position he would have occupied had the discrimination not occurred. The federal interest in making the victims of discrimination whole clearly outweighs the

state's interest in asserting its Eleventh Amendment rights in such a way that would allow it to discriminate with impunity against the disabled.

As this Court has noted, the major purpose of the Rehabilitation Act is to provide employment. See Consolidated Rail Corp. v. Darrone, 465 U.S. ___, n. 13.¹⁸ That Scanlon, as a result of employment discrimination by the state of California, has been denied an opportunity to complete his requirements for his graduate degree, thereby delaying his ability to pursue his chosen career, unquestionably justifies an award of attorney's fees, costs and equitable relief as the court deems proper.

¹⁸"The primary goal of the Act is to provide employment." Consolidated Rail Corp., supra, n. 13; cited in Alexander v. Choate, supra, n. 28.

CONCLUSION

This Court's decisions in Hans and Edelman and its decisions in Ex parte Young, Ex parte Virginia, Hutto and Fitzpatrick appear to be in conflict. On the one hand, the Eleventh Amendment bars all suits against a state by its citizens but on the other hand, exceptions have been created when the Fourteenth Amendment is involved or where plaintiffs are ingenious enough to file their suits against state officials rather than the state itself. It is the contention of this amicus curiae that the apparent conflict in these cases is explained by reference to underlying principles of federalism. That is to say, the Eleventh Amendment recognizes that each state is sovereign with plenary powers; the federal government exists by consent of the federated states and the people and has only the powers granted it by the Constitution.

Seen in this light, the Eleventh Amendment states a principle -- the sovereign immunity of the individual states -- which except for the fact of Chisholm, might never have needed expression. It is a principle axiomatic to our constitutional form of government.

But where Hans and Edelman reaffirm the sovereign immunity of the states, the Court is well aware that applying sound principles of federalism to different circumstances may operate to eliminate that immunity. Such is the case at bar. Scanlon is not barred from suing California because he sues under a Congressional Act passed pursuant to the Fourteenth Amendment; he seeks prospective and injunctive relief; and the federal

interest in ending employment discrimination against the handicapped outweighs California's claim of sovereign immunity.

Respectfully submitted,

Joan M. Graff
Executive Director

Robert Barnes
Counsel of Record

William Hebert
Law Clerk

Diane G. Worley
Law Clerk

Attorneys for Amicus
Curiae

